

Court of Appeals, State of Michigan

ORDER

People of MI v Queshon Quamon Barkus

Henry William Saad
Presiding Judge

Docket No. 278761

Karen Fort Hood

LC Nos. 05-204135-FH & 05-204137-FH

Stephen L. Borrello
Judges

On the Court's own motion, the opinion issued in this case on July 22, 2008, is AMENDED as follows:

1. The caption is modified to include LC No. 05-204135-FH.
2. The first paragraph of the opinion is replaced with the following paragraph (new text is underlined):

Defendant pleaded guilty to delivery and manufacture of a controlled substance between 50 and 449 grams, MCL 333.7401(2)(a)(iii), felon in possession of a firearm, MCL 750.224f, possession of less than 25 grams of a controlled substance, two counts of possession of a firearm during the commission of a felony, MCL 750.227b, delivery of less than 50 grams of a controlled substance, MCL 333.7401(2)(a)(iv), and third degree fleeing and eluding, MCL 257.602a(3). He was sentenced as a third habitual offender, MCL 769.11, to concurrent terms of 117 to 480 months on the delivery convictions, and 80 to 120 months on the felon in possession conviction and fleeing and eluding conviction, to be served consecutively to concurrent terms of 64 to 96 months on the possession conviction and two years on the felony firearm convictions. Following this Court's denial of defendant's delayed application for leave to appeal, Docket No 274765, our Supreme Court remanded to this Court for "consideration, as on leave granted, of whether the Oakland Circuit court erred in scoring Sentencing Guidelines Offense Variable 13, MCL 777.43, at 25 points. See *People v Francisco*, 474 Mich 82, 96[; 711 NW2d 44] (2006)." We affirm defendant's convictions, vacate his sentences, and remand for a recalculation of the sentencing guidelines and resentencing. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

3. The third paragraph of the opinion is replaced with the following paragraph (new text is underlined):

In the instant case, defendant received a score of 25 points for OV 13 based on three crimes against persons that were committed in 1990. These three crimes were beyond the five-year period that included the sentencing offenses. The sentencing offenses themselves did not involve any crime against a person. We note that the factual basis for the plea and the agent's description of the offense in the presentence investigation report indicate that the third degree fleeing and eluding conviction did not result from injury to a person. It was based on the crime having taken place in an area

where the speed limit was 35 miles an hour or less. Thus, defendant should have received a score of zero points for OV 13. Defendant's total OV score should have been 50, and his minimum guidelines range should have been 99 to 160 months instead of 117 to 160 months. The understanding at defendant's plea was that he would be sentenced at the low end of the guidelines range. Although an erroneous scoring does not require resentencing if the trial court would have imposed the same sentence regardless of the error, *People v Mutchie*, 468 Mich 50, 51-52; 658 NW2d 154 (2003), this case must be remanded since such a conclusion cannot be drawn.

In all other respects, the July 22, 2008, opinion remains unchanged.



A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

OCT 20 2008
Date

Sandra Schultz Mengel
Chief Clerk